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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 29

INWOOD MATERIAL TERMINAL, LLC, Employer, and CARLOS CASTELLON, Petitioner. UNITED PLANT & PRODUCTION WORKERS LOCAL 175 P, Intervenor.	No. 29-RD-206581 **AMICUS BRIEF IN SUPPORT OF REQUEST FOR REVIEW BY INTERVENOR UNITED PLANT & PRODUCTION WORKERS LOCAL 175 P**

Amicus respectfully files this brief in support of Intervenor United Plant & Production Workers Local 175 P's ("Intervenor") request for Review of the Regional Director's Decision and Direction of Election ("Decision") in the above captioned case. The Decision found that the collective bargaining agreement ("CBA") entered into between employer Inwood Material Terminal, LLC ("Employer") and Intervenor was not a bar to Petitioner Carlos Castellon's ("Petitioner") petition to decertify Intervenor as the representative of the bargaining unit. *See* Decision (Dec.) at 1. Review is appropriate in this case because the Decision was based on an

outmoded and overly restrictive understanding of how contracts are executed in the modern business and workplace environment. As numerous courts, federal statutes, and federal agencies, including the Board, have recognized, email and electronic signatures have become the norm rather than the exception for forming agreements in both the private and public realm. Holding parties to a CBA to a higher standard of contract formation than that which is generally recognized in other business and employment agreements encourages the kind of foot-dragging and gamesmanship that the Employer displayed in the present case. By failing to recognize the validity of CBAs executed through electronic means, the Decision abdicates the Board's responsibility "to adapt the Act to the changing patterns of industrial life." *Hudgens v. NRLB*, 424 U.S. 507, 523 (1976) (citing *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975)).

In *Appalachian Shale Products Co.*, 121 NLRB 1160, 1162 (1958), the Board held that "a contract to constitute a bar must be signed by all the parties before a petition is filed and that unless a contract signed by all the parties precedes a petition, it will not bar a petition even though the parties consider it properly concluded and put into effect some or all of its provisions." The Board eliminated the exception to this general rule that it had previously recognized, allowing for a bar "where the parties considered the agreement properly concluded and put into effect some of its important provisions." *Id.* at 1161. The Board reasoned that "the creation of exceptions such as this only serve to render unduly complex a field that should not have become so involved." *Id*. at 1162. This rationale does not support the Decision's holding in the present case. Recognizing a bar where any reasonable finder of fact would determine that a binding contract was formed through an exchange of emails would not add any new complexity or uncertainty to the collective bargaining relationship. Rather, it would bring labor relations into the Twenty-First Century economy where nearly all commercial or employment-related transaction occur—an economy where contracts formed through email or electronic signatures are almost universally accepted as valid.

I. THE ELECTRONIC COMMUNICATIONS BETWEEN INTERVENOR AND EMPLOYER DEMONSTRATE A VALID OFFER AND ACCEPTANCE OF THE COLLECTIVE BARGAINING AGREEMENT TERMS

On July 7, 2017, Employer's counsel forwarded to Intervenor's counsel a "final" collective bargaining agreement, noting that only the "working dues," a non-mandatory subject of bargaining, had to be added. *See* Dec. at 2. The amount of working dues had already been set forth in prior contract drafts, so adding it was simply an administrative task. *Id*. The Union filled in the previously agreed upon working dues amount, signed and dated the CBA, and delivered it to Employer. Dec. at 2. On July 19, 2017, Intervenor's counsel sent an email to Employer's counsel asking when it should expect to receive back a signed copy of the CBA, and Employer's counsel responded, also by email, "It is effective July 17—I will send as soon as I receive." Dec. at 3 n.6. On July 26, 2017, Intervenor's counsel sent another email to Employer's counsel again asking when they would receive a signed copy of the CBA, and whether Employer was "reneging" on the agreement. *Id.* In response, Employer's counsel forwarded a message from Employer stating that he had been away, but would "complete the last technicality as soon as I physically can. There is no reneging taking place." *Id.*

Applying black letter contractual principles confirms that the parties formed a binding agreement through their email communications. If not the signed agreement itself, the July 7, 2017 email from Employer to Intervenor attaching the final CBA was at least an offer, as it contained all material terms and only left out the working dues amount, which the parties had previously agreed to. Intervenor accepted the offer at the latest when it filled in the missing working dues term, signed the CBA, and delivered it to Employer. The Employer itself confirmed via email that its physical signature was only a "technicality" and that from its point-of-view the matter was settled. Alternatively, if the Union's delivery of the signed CBA to the Employer is viewed as an offer, the Employer's email stating that the CBA "is effective July 17," is a clear manifestation of intent to accept that offer.

The Regional Director's conclusion that the CBA "was not signed by the Employer until December 15, 2017," Dec. at 7, puts form over substance and fails to take account of the widely accepted use of email and electronic signatures to execute agreements in the modern economy.

II. NUMEROUS COURTS HAVE RECOGNIZED THE VALIDITY OF CONTRACTS FORMED VIA EMAIL COMMUNICATIONS IN BOTH THE EMPLOYMENT AND GENERAL BUSINESS CONTEXT

In denying that Intervenor and Employer executed a valid CBA, the Decision goes against court decisions in multiple states recognizing that contracts may be formed through electronic communications. Courts have found offer and acceptance provided through email in both the employment context, *Kolchins v. Evolution Markets, Inc*., 128 A.D.3d 47 (N.Y. App. Div. 2015), and the general business context, *Petroplast Petrofisa Plasticos S.A. v. Ameron International Corporation*, 2011 Del. Ch. LEXIS 95 (Del. Ch. 2011); *Clean Properties, Inc. v. Risellli*, 2014 Mass. Super. LEXIS 106 (Mass. Super. Ct. 2014).

In *Kolchins*, the employer, an international finance firm, sent an email to Plaintiff, a high-level executive in the company, stating the basic terms of an offer to renew his employment contract. 128 A.D. 3d at 51-52. The next day, the Plaintiff sent a reply email to the employer stating, "I accept, please] send contract," to which the employer replied, "Mazel. Looking forward to another great run." *Id.* at 52. The parties then engaged in a lengthy back-and-forth over particular contract terms, and the employer ultimately notified the Plaintiff that his employment had been terminated. *Id*. at 56. After Plaintiff brought suit, *inter alia*, for breach of the renewed employment contract, the employer moved to dismiss on the grounds that the renewal contract was never formed. The Court denied the motion to dismiss, holding that the exchange of emails was sufficient to demonstrate that a binding agreement had possibly been executed, with the employer's initial email setting out key terms potentially constituting an offer and the Plaintiff's emailed statement, "I accept," soon after potentially constituting acceptance. *Id*. at 59. The Court reasoned that "there is no blanket rule by which email is to be excluded from consideration as documentary evidence," and the employer's initial email set out all essential terms, so it "was not merely an incident in 'preliminary negotiations.'" *Id.*

The email exchange here is very similar to that in *Kolchins*. As in *Kolchins*, the Employer attached to its initial email to Intervenor a final agreement setting out all material terms, save "working dues," which had already been agreed to between the parties and in any case is not a mandatory subject of bargaining. Intervenor accepted this offer in no uncertain terms when it signed the CBA and delivered it back to Employer. As in *Kolchins*, where the Employer indicated its understanding that an agreement had been reached through its emailed expression of congratulations and anticipation of "another great run," the Employer here also clearly demonstrated its understanding that a binding agreement had been reached when it stated, "It is effective July 17."

Likewise, in *Clean Properties v. Riselli*, 2014 Mass. Super. LEXIS 106, at *1-2 (Mass. Super. Ct. 2014), an environmental clean-up company sent a proposed written agreement to Plaintiff property owner stating that it needed to receive acceptance of the contract terms before it could begin the job. Plaintiff responded by email the same day indicating her acceptance of the proposed agreement. *Id.* at *2. Plaintiff brought suit seeking to obtain a discharge of the company's mechanics' lien on the ground that "no written contract was ever formed because neither party affixed a handwritten signature to a paper form of the contract." *Id.* at *2-3. The court rejected Plaintiff's argument out-of-hand, stating that her "email acceptance of the written contract terms proposed by [the company] created a written contract." *Id*. at *3. Particularly relevant to the court was the State's adoption of the Uniform Electronic Transactions Act, under which "[a] contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation." *Id*. at *3-4; *see also, e.g.*, 15 U.S.C. § 7001(2) (Electronic Signatures in Global and National Commerce, using identical language).

As in *Clean Properties*, the Employer here sent a written contract to Intervenor that included all material terms, and both parties demonstrated their intention to form a binding contract through subsequent email communications. The Employer should not be permitted to deny the existence of a valid written agreement simply because it had not affixed a physical signature to the CBA.

III. THE BOARD'S OWN PRECEDENT RECOGNIZES THE INTEGRAL ROLE OF ELECTRONIC COMMUNICATIONS IN THE CONTEMPORARY BUSINESS ENVIRONMENT AND WORKPLACE

In *Purple Communications, Inc. and Communications Workers of America, AFL-CIO*, 361 NLRB No. 126, at *1-3 (2014), the Board recognized the right of employees under Section 7 of the National Labor Relations Act (NLRA) to utilize email for statutorily protected communications on nonworking time when the employer has provided employees access to their email systems. In overturning a prior decision denying employees such a right, *Register Guard*, 351 NLRB 1110 (2007), the Board found that it had placed "too little on the importance of email as a means of workplace communication." *Purple Commc'ns*, 361 NLRB 126, at *2. The Board stated in no uncertain terms that "email has become a critical means of communication about both work-related and other issues, in a wide range of employment settings," and cited an April 2014 report finding that "[e]mail remains the most pervasive form of communication in the business world." *Id.* at *25, *28.

Since the first email case in 1993, the Board has recognized that employees and employers use email for work-related purposes, including communicating about issues related to working conditions. *E.I. Du Pont De Nemours & Co.*, 311 NLRB 893, 9191 (1993); *see also Grand Canyon Education, Inc.*, 362 NLRB No. 13 (2015), *reaffirming*, 359 NLRB No. 164 (2013) (victim of Noel Canning); *Cal. Inst. of Tech.*, 360 NLRB 504 (2014); *Food Servs. of America*, 360 NLRB 1012 (2014), *on subsequent decision*, 365 NLRB No. 85 (2017); *Hitachi Capital America Corp*, 361 NLRB 123 (2014) and; *Timekeeping Sys., Inc.*, 323 NLRB 244 (1997) (all reflecting use of email by employers and employers).

The Board has also affirmed the validity of electronic signatures to form binding agreements in the employment context. In *RPM Pizza, LLC and Dale Firmin*, 363 NLRB No. 82 (2015), the Board affirmed the ALJ's findings, including that an employee arbitration agreement was executed electronically as part of the on boarding process. *Id*. at 8 ("In completing the application or on boarding process, applicants must click on the screen to indicate that they have read and agree with the [Arbitration Agreement] before the computer will proceed to the next

screen. Applicants confirm their understanding and acceptance of an agreement with the [Arbitration Agreement] with an electronic signature and date on an applicant acknowledgement form."); *see also Chesapeake Energy Corp. and Bruce Escovedo*, 362 NLRB NO. 80, at 5 (2015) ("Respondents assert that the [dispute resolution policy] was electronically signed by the Charging Party . . . and further contend that his electronic signature on the document is binding.").

Additionally the NLRB has allowed the use of electronic signatures in its own internal administrative processes. For example, the October 26, 2015 Guidance Memorandum on Electronic Signatures to Support a Showing of Interest (Memorandum GC 15-08 (Revised)) (the "GC Memo") directs Regional Directors, Officers-in-Charge, and Resident Officers to accept electronic signatures to support representation petitions as long as minimal safeguards against forgery or fraud are maintained. The GC Memo recognizes that "the Board's traditional requirements can be adapted to accommodate Congress' strong policy preference for the use and acceptance of electronic signatures whenever practicable." GC Memo at 1; *see also* 15 U.S.C. § 7001(a)(1). The GC Memo further cites guidance from the Office of Management and Budget that "a decision to reject the electronic signature option is justifiable only where 'there is no reasonably cost-effective combination of technologies and management controls that can be used to operate the transaction and sufficiently minimize the risk of significant harm.'" 79 Fed. Reg. at 74330 (quoting OMB Guidance, 65 FR at 25512). The general preference for providing the public with the option to utilize electronic means for transacting business is also reflected in other federal agencies' encouraging the use of electronic disclosure. 40 C.F.R. § 3.2 (EPA allows use of electronic reporting of mandatory documents); 27 C.F.R. § 73.1 (same for Alcohol and Tobacco Tax and Trade Bureau, Department of the Treasury).

Among the reasons that the GC Memo gave for allowing the use of electronic signatures to support a showing of support is that "the methodology is convenient and consistent with how many members of the public operate today in various aspects of their lives—electronic signature pads for credit or debit purchases, and electronic filing of taxes." GC Memo at 4. The same can

easily be said of the use of electronic communications to execute contracts. If electronic signatures and email communication have reached a level of such broad acceptance not only in the private sector, but in the internal processes of federal agencies, there is no reason that it should not be affirmed as a valid means for executing agreements in the collective bargaining context. Requiring physical signatures to effectuate a CBA leaves labor relations in a bygone era of contract formation. *See also* 82 Fed. Reg. 11746 (2017) (Board rulemaking regarding procedural changes including e-filing and antiquated technology). The Board also recognized the use of email as a mechanism for distributing remedial notices in *J & R Flooring*, 356 NLRB No. 9 (2010), which has been applied to all Board decisions without apparent objection to date.

It is also impractical to require physical signatures because so much communication is done by email that requiring a physical signature imposes an unnecessary burden and hurdle on parties' ability to effectuate a CBA. Most labor relations personnel, including union and management, will believe that they have concluded negotiations upon electronic exchange and agreement to a contract. Subsequent confirmation of ratification by the union and acceptance by the employer will seal the contract. There is no longer a purpose served by requiring physical or electronic signatures. The medieval rule requiring physical signatures may have made sense centuries ago, or even 75 years ago, but it is inconsistent with modern modes of communication.

IV. CONCLUSION

The Board should recognize the validity of electronic communications and signatures to effectuate a CBA that can serve as a bar to a decertification petition, just as it recognizes the validity of electronic signatures in the context of representation petitions and as numerous courts recognize binding contracts formed through electronic means. The reason for requiring signatures is to avoid the uncertainty that comes with oral agreements. There is no such uncertainty in the use of emails and electronic signatures to execute agreements, which is why they have become nearly universal in both the employment and general business contexts. The Decision's overly narrow reading of *Appalachian Shale* ignores the reality of electronic

transactions in the modern economy and values form over function. The rule derives from the ancient time when officials' seals were required to verify documents, and it is now antiquated.

Dated: June 26, 2018

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PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction this service was made. I am over the age of eighteen years and not a party to the within action.

On June 26, 2018, I served the following documents in the manner described below:

AMICUS BRIEF IN SUPPORT OF REQUEST FOR REVIEW BY INTERVENOR UNITED PLANT & PRODUCTION WORKERS LOCAL 175 P

☑ (BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kkempler@unioncounsel.net to the email addresses set forth below.

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☑ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on June 26, 2018, at Alameda, California.

/s/ Karen Kempler
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